No. 87-354

In The
# Supreme Court of the United States
October Term, 1987

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THE STATE OF ARIZONA,

*Petitioner,*

vs.

RONALD WILLIAM ROBERSON,

*Respondent.*

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## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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## PETITIONER'S BRIEF ON THE MERITS

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ROBERT K. CORBIN
The Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

BRUCE M. FERG
Asst. Attorney General
315 State Government Bldg.
402 West Congress
Tucson, Arizona 85701-1367
Telephone: (602) 628-5501

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

IS THE RULE OF *EDWARDS v. ARIZONA* THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT APPLICABLE TO A CASE WHERE THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF *MIRANDA v. ARIZONA*?

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UNITED STATES CODE



SUPREME COURT RULE



ARIZONA RULES OF CRIMINAL PROCEDURE



MISCELLANEOUS

## OPINIONS BELOW

Afer a suppression hearing the trial court ruled that the police had obtained statements from Roberson in violation of *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), so the statements could not be used by the prosecution during its case-in-chief. *Routhier* purports to apply *Edwards v. Arizona*, 451 U.S. 477 (1981). The State appealed this ruling to Division Two of the Arizona Court of Appeals, but the State's claims were rejected in an unpublished Memorandum Decision, *State v. Roberson*, 2 CA-CR 4474-5 (Ariz.Ct.App., Mar. 19, 1987). The State then petitioned for review by the Arizona Supreme Court, but such review was denied by order on June 30, 1987. The Memorandum Decision and the order are reproduced in the Appendix to the Petition for Writ of Certiorari.

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## JURISDICTION OF THIS COURT

The action of the Supreme Court of Arizona denying review of the proceedings below occurred on June 30, 1987 and was reflected in a written notice dated July 1, 1987. No rehearing was requested. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

AMENDMENT VI.

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## STATEMENT OF THE CASE

This litigation actually involves two wholly separate criminal cases. The present one, Pima County No. CR-16041, concerned a charge that Roberson burglarized a home on April 15, 1985, and stole certain property belonging to Kenneth Baarson. (State Court Record on Appeal, hereafter referred to as R., at 1.)[1] That same day, April 15, Detective Jerry Cota-Robles of the Burglary Division of the Tucson Police Department received information from a witness to that burglary, describing both a suspect and his vehicle, including a Montana license number. (R.T.

[1]The pages of the Record are serially numbered, so numerical citations are to an actual page rather than an item number.



of April 3, 1986, at 3-7, 15-16.)[2] On April 18, Cota-Robles called the Major Offenders Unit of the Tucson Police Department to alert them about the suspect vehicle. (*Id.* at 7-8). The person with whom he spoke, Det. Barbara Wright, recognized the vehicle description and told Cota-Robles that a subject had recently been arrested in that car for doing another burglary. (*Id.* at 8-9, 17.)

Cota-Robles therefore contacted the case officers on the case in which the arrest had been made, Detectives Quinn and Thorson, and arranged to go with them to question the arrestee, Ronald Roberson, on April 19. (*Id.* at 9-10.) Cota-Robles was unaware whether Roberson had been questioned before, and no one mentioned any assertion of rights having occurred. (*Id.* at 10-11, 18.) At the jail Cota-Robles informed Roberson of his rights and Roberson indicated understanding of them, so the detective turned on the tape recorder, advised Roberson of his rights once again, and proceeded with Det. Quinn to question him about the April 15 burglary. (*Id.* at 10-15, 18-20.) Roberson never said anything about wanting an attorney. (*Id.* at 19.) The resulting taped statement (a transcript of which was admitted as Exhibit 1A at the suppression hearing held on April 3, 1986) amounted to a full confession of the April 15 burglary, but never touches upon the April 16 crime during which Roberson was caught.

The wrinkle develops in this seemingly routine case because of a problem in the other case, CR-15268. It seems that when Roberson was arrested on April 16, he was apprended and warned of his rights at the scene by a uni-

[2]Herein, "R.T." refers to a reporter's transcript.

formed officer named Perez, and stated to Perez that he wanted a lawyer before answering any questions. (R.T. of April 3, 1986, at 26.) Roberson was also questioned at the scene by an officer named Garrison. (*Id.* at 23; R. at 107.) The defense counsel, after consulting with Roberson, stipulated that Garrison was not aware that Roberson had invoked his right to a lawyer. (R.T. of April 3, 1986, at 49, 52.) Detective Quinn also spoke to Roberson at the scene:

> Q. Prior to your speaking to Mr. Roberson at the scene itself, did you either inquire of him or any other person at the scene whether or not he had been advised of his constitutional rights?
>
> A. Actually, it was both, himself and the officer there.
>
> Q. Who did you ask first?
>
> A. Sergeant Harper was the supervisor there. And he was the reason I was there in the first place. He had called out to the Eastside Office and indicated they had a person in custody who had indicated that he was willing to give a statement. That was the reason I was there.
>
> With that knowledge, I then spoke with Mr. Roberson briefly. At that time he was in custody, I believe, in Officer Perez' police car. And I asked if it was true he was willing to give a statement. And he indicated yes, he would.

(R.T. of Oct. 17, 1985, P.M., at 8.)[3]

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[3]This transcript, which was of a suppression hearing in CR-15268, was designated by the prosecutor as part of the record used on the appeal in the present case. (R. at 124.) It therefore is properly before this Court.



Roberson was then transported to the Eastside police substation, where he was further questioned by Quinn and Detective Wright. (*Id.* at 9-11.) The defense, as part of its stipulation, agreed that Quinn and Wright were unaware that Roberson had ever invoked his right to counsel. (R.T. of April 3, 1986, at 49, 52.) The prosecutor also stated that Roberson had been approached by two other officers on April 17 (the day immediately following the arrest), who warned Roberson of his rights and talked to him after he had waived his rights. (*Id.* at 49.)[4] The stipulation by the defense that none of the officers subsequent to Perez knew that Roberson had asked for a lawyer includes these April 17 questioners. (*Id.* at 49, 52.) The record contains no other information about what may have transpired between Roberson and these officers.

Roberson's statements to Garrison, Quinn, and Wright were suppressed in CR-15268, to the extent that they could be used only for impeachment, not in the state's case-in-chief. (R. at 107; R.T. of April 3, 1986, at 27.) The defense in the present case requested that Roberson's statement given on April 19 to Cota-Robles be similarly suppressed, on the basis of *Edwards v. Arizona* and *State v. Routhier*, *supra*. (R. at 106-09.)

The trial court found as a matter of fact that there was no connection whatever between the April 16 violation and the April 19 questioning.

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[4]This statement by the prosecutor was overlooked at the time of the drafting of the Petition in this case, which incorrectly stated that Roberson "was left alone for 3 days before being reapproached . . ." (Petition at 24.) Counsel for Petitioner apologizes to the Court for this inadvertent misstatement.

THE COURT: Well, nobody is questioning Detective Cota-Robles' motives or his methods. You know, what he has done, there's nothing wrong with what he has done except for the fact that the man had invoked his right to counsel earlier.

MR. DRAKE: All right, is the Court specifically finding that the April 19th interrogation by Detective Cota-Robles was in no way a fruit of the April 16th violation, other than it followed it in time?

THE COURT: Yes.

MR. LAURITZEN: So it was not a fruit?

THE COURT: No, I find that it was not.

(R.T. of April 3, 1986, at 50-51.) It also concluded that the statements were sufficiently trustworthy to be admissible for impeachment purposes, in accord with *State v. Swinburne*, 116 Ariz. 403, 569 P.2d 833 (1977).[5] Nonetheless, the trial court felt itself bound by *Routhier* to grant the motion to suppress, to the extent that the confession could not be used in the state's case-in-chief. (*Id.* at 43-46.) The prosecutor was permitted to dismiss the case without prejudice in order to appeal the suppression motion. (*Id.* at 60-61.)

The Arizona Court of Appeals affirmed the suppression order. It noted that no Fifth Amendment decision by

[5]In *Swinburne* the Arizona Supreme Court followed this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), which permitted a voluntary but *Miranda*-violative statement to be used to impeach a testifying defendant. The trial court's reference to *Swinburne* therefore amounts to an implicit finding that Roberson's statement to Cota-Robles was voluntary. Roberson did not testify at the suppression hearing so Cota-Robles' testimony that no threats or promises were employed, that Roberson's responses to questions were appropriate, and that the tone of the interview was "relaxed and conversational" (R.T. of April 3, 1986, at 14, 21) is uncontroverted.



this Court had addressed the issue of interrogation initiated by the police about a second, unrelated, case after invocation of the right to counsel had occurred in the original case, and since it did not believe that this Court's recent Sixth Amendment decisions had any application, it followed the *Routhier* rule that such questioning is a violation of *Edwards*. The State petitioned the Arizona Supreme Court for review on the basis that the *Routhier* rule was an unjustified expansion of *Edwards* which contradicted a variety of this Court's more recent decisions, but that petition was denied. A petition for writ of certiorari was filed in this Court, which granted the petition on December 7, 1987.

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## SUMMARY OF THE ARGUMENT

The Arizona courts in this case excluded from use in the prosecutor's case-in-chief a defendant's statements, which were both voluntary and given after proper warning and waiver as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This exclusion was premised on the fact that (unbeknown to the interviewer), 3 days before the interview in which the statement at issue had been given, the defendant had invoked his right to counsel to a different officer, in the course of a wholly separate investigation, and had remained continuously in custody without seeing a lawyer. An Arizona case called *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), purportedly applying this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), had held that once a defendant asked to speak with

an attorney, all subsequent police-initiated statements were subject to exclusion, even if the questions asked related to an investigation wholly separate from the one in which the defendant had requested counsel. Therefore, applying *Routhier*, the Arizona courts forbade use of the statement obtained in this case, except as impeachment.

The brief which follows argues first that the *Edwards per se* rule excluding statements given in a police-initiated interview after counsel has been requested cannot properly be applied to a case where the subsequent interview is part of a wholly separate investigation. This Court has repeatedly refused to extend *Miranda*, the progenitor of *Edwards*. *Routhier*, however, extended and distorted *Edwards* (a one-investigation case) by excluding a statement concerning one investigation (in which the defendant had asked for counsel) that was volunteered during an interview concerning a completely *separate* investigation, in which counsel had not been requested. The present case goes even beyond *Routhier* in its distortion of *Edwards* by excluding a statement that not only was *developed* in an investigation completely separate from the one in which counsel had been requested, but *related* solely to that separate investigation. Such extension disregards not only the facts of *Edwards* and *Miranda* (both of which were one-investigation cases), but their rationale as well, because good faith pursuit of an investigation separate from the one in which counsel is requested cannot reasonably be expected to produce the kind of "badgering" those cases were intended to prevent. Thus, *Routhier/Roberson* cut *Edwards* completely adrift from its facts and its logic.

This brief, in its second argument, undertakes a detailed examination of this Court's primary post-*Miranda*



confession cases. This survey demonstrates that this Court has repeatedly indicated, both implicitly and explicitly, that multiple investigation cases are *not* to be treated the same as single investigation cases. Those decisions, especially a companion case to *Miranda* called *Westover v. United States*, *Michigan v. Mosley*, 423 U.S. 96 (1975), *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Connecticut v. Barrett*, — U.S. —, 107 S.Ct. 828 (1987), leave no doubt that *Edwards* should not be extended to exclude statements developed in investigations separate from the one in which counsel was requested. Therefore, particularly in view of the "independent source" doctrine, it is concluded that the interpretive path taken by the Arizona courts, exemplified by the exclusionary order in this case, deviates unacceptably from a proper understanding of *Edwards*.

The final argument takes a critical look at the *Edwards per se* rule against police initiation. That discussion demonstrates that this Court does not consider the *Edwards* rule to be essential to trustworthy interrogation or a fair trial; that subsequent decisions by this Court have severely undercut the factual and legal basis for that *per se* exclusionary rule; that *Edwards* has not provided the simple, "bright line", rule it was intended to give; and that the *per se* rule does not meet this Court's own standards for a constitutionally acceptable inference. It therefore is argued that, even though the present case is sufficiently distinguishable that *Edwards* should not be applied to it, the Court would be wiser to drop the *Edwards per se* rule altogether, and apply instead the traditional waiver test of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

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## ARGUMENTS

### I.

### THE APPROACH TO EDWARDS v. ARIZONA TAKEN IN RECENT ARIZONA DECISIONS ON MULTIPLE INVESTIGATION CASES SHOULD BE REJECTED BY THIS COURT, BECAUSE THAT APPROACH MISCONCEIVES EDWARDS AND UNJUSTIFIABLY EXTENDS IT BEYOND ITS FACTS AND ITS RATIONALE.

In the case at bar the Arizona Court of Appeals believed it was following a previous decision of the Arizona Supreme Court, *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), which itself purported merely to apply this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). However, *Routhier* actually goes beyond *Edwards*, and the present case goes even beyond *Routhier*. Because the *Routhier/Roberson* interpretation misconceives the proper ambit and application of *Edwards*, they must now be rejected by this Court. The extent to which the Arizona approach distorts this Court's doctrine can best be illustrated by beginning at the beginning, *Miranda v. Arizona*, 384 U.S. 436 (1966).

This Court decided *Miranda v. Arizona* and its companion cases some two decades ago, mandating therein the now familiar quartet of warnings to be administered to persons with whom the police desire to engage in custodial interrogation. During the intervening years the policy of the Court has generally been to clarify *Miranda* as needed, but not to extend it. This policy was noted by Chief Justice Rehnquist, then sitting as Circuit Justice, in his in-chambers opinion on application for stay in *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978):



> [T]his Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. I think this reluctance is shown by our decisions reviewing state-court interpretations of *Miranda*. As we noted in *Oregon v. Hass*, 420 U.S. 714, 719 (1975), "a State may not impose . . . greater [*Miranda*] restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original.)

*See also* cases cited therein, 439 U.S. at 1314-15; *New York v. Quarles*, 467 U.S. 649, 658 (1984); *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1986).

One of the few exceptions to this policy of not tampering with *Miranda* was *Edwards v. Arizona*, 451 U.S. 477 (1981), an extension by this Court rather than by some lower court. Robert Edwards was arrested for robbery, burglary, and murder, all of those charges aising out of one incident. (451 U.S. at 478; *State v. Edwards*, 122 Ariz. 206, 209, 594 P.2d 72, 75 (1979).) After being properly warned pursuant to *Miranda*, Edwards submitted to police questioning, which was terminated when he said, "I want an attorney before making a deal." (451 U.S. at 478-79.) The next day two detectives came to the jail where Edwards was being held, and when Edwards said that he did did not want to talk to anyone, the guard told him that he "had to" talk to them and took Edwards to the detectives. (*Id.* at 479.) After being rewarned pursuant to *Miranda*, Edwards agreed to talk to them and ultimately implicated himself in the crimes, though he declined to be tape re-

corded. (*Id.*) This Court concluded that his statement should be suppressed, promulgating a new procedural rule which went beyond its holding in *Miranda*.

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler*, *supra*, [441 U.S. 369] at 372-376, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

(*Id.* at 484-85; footnote omitted.)

Thus, even in reaching its *Edwards* holding the Court had taken a pair of substantial jurisprudential leaps. First, in *Miranda*, it promulgated a whole set of "prophylactic" rules in aid of a defendant's Fifth Amendment privilege, even though such rules were not constitutionally required. *Michigan v. Tucker*, 417 U.S. 433 (1974). Then, in *Edwards*, it ruled that after a defendant's invocation of the *Miranda*-generated right to counsel during custodial interrogation, the police could not question the defendant again unless counsel had been made available or the accused himself "initiated" the conversation. However,



"*Edwards* was not a necessary consequence of *Miranda*." *Solem v. Stumes*, 465 U.S. 638, 648 (1984). Given this Court's general reluctance to expand *Miranda*, it is unreasonable to believe that its extension even beyond the facts of *Edwards* was ever contemplated.

The *Edwards* case had involved reinterrogation of a defendant about the *same* crime about which he was being questioned when he had invoked his right to counsel, by detectives out of the very same section as those to whom Edwards had made his invocation of the right. (122 Ariz. at 209, 594 P.2d at 75.) However, *State v. Routhier*, *supra*, involved a very different scenario. Dennis Routhier had killed one man and injured another with blows from a hammer (Lawrence and Robert Barrick), but was himself injured and taken into custody after an automobile accident which occurred as he fled from the police. (137 Ariz. at 93, 669 P.2d at 71.) He was initially questioned by Detective Barber on September 21, 1980, at Good Samaritan hospital, but that interview ended when Routhier said that he wanted to speak to an attorney. (137 Ariz. at 93-94, 669 P.2d at 71-72.) Three days later, after Routhier had been transferred to the detention ward at Maricopa County Hospital, but before counsel had been provided to him, he was approached by another detective, named Locksa. Locksa was aware of the previous request for counsel, so he specifically told Routhier that he wanted to discuss two unrelated homicides, *not* the Barrick crimes, and then gave a new set of *Miranda* warnings. (137 Ariz. at 94, 669 P.2d at 72.) Routhier said he was willing to talk to Detective Locksa, but "In response to Detective Locksa's questions regarding these unrelated homicides, [Routhier] implicated himself in the Barrick homicide." (*Id.*)

The Arizona Supreme Court, declining a suggestion that the case should be controlled by *Michigan v. Mosley*, 423 U.S. 96 (1975), relied solely upon *Edwards*. It held that the factual difference that the renewed questioning in *Routhier* pertained to an offense other than the one in view when the right to counsel had been invoked lacked "any legal significance for fifth amendment purposes", so *Edwards* applied, and the statement could not be used during the prosecution's case in chief. (137 Ariz. at 96-98, 669 P.2d at 74-76.) Thus, *Routhier* applied *Edwards* to a factual situation which nothing in *Edwards* indicates was ever contemplated by this Court, thereby taking the jurisprudence of confessions yet another step away from its Fifth Amendment roots—to preclude direct use of a properly "*Mirandized*" statement, after the officer specifically said he didn't want to discuss the case regarding which the right to counsel had previously been invoked, and the defendant "willing[ly]" talked without ever reinvoking his rights on the new case.

The final extension has occurred in the present case, which (without providing additional reasoning or even noticing the further leap it is making) goes even beyond *Routhier*. As pointed out in the Statement of the Case, *supra*, not only did Detective Cota-Robles *question* Roberson about a case unrelated to the one on which he had invoked and then waived his rights, but the *answers* all pertained to that unrelated case. The detective didn't even know of the invocation of rights on April 16. Roberson talked willingly, never invoked his rights, never mentioned his previous invocation of rights. The trial court specifically found that the statement was in no way a fruit of the April 16 violation of Roberson's right to counsel, and that "there's nothing wrong with what [the detective] has done except for the fact that the man had invoked his right to counsel earlier." (R.T. of April 3, 1986, at 50.)



It appears that the Arizona courts have succumbed to an approach closely akin to "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for an extension to a wholly different situation." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L.REV. 929, 950 (1965), quoted in *Miranda v. Arizona*, 384 U.S. at 514 (Harlan, J., dissenting). This Court has repeatedly emphasized that *Miranda's* requirements should not be extended in ways that "would cut this Court's holding in that case completely loose from its own explicitly stated rationale", *Beckwith v. United States*, 425 U.S. 341, 345 (1976), and presumably the same admonition applies to *Edwards*. Nonetheless, that is precisely what *Routhier* and now *Roberson* are doing—by focusing on decontextualized language while slipping the anchor of the rationale for *Miranda* and *Edwards*, they have drifted to conclusions that this Court surely could not have intended to result from those decisions.

A major concern in *Miranda* was repetitive interrogation that would eventually wear down the subject's resistance to making self-incriminatory statements. "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Michigan v. Mosley*, *supra*, 423 U.S. at 102. This same

concern is at the heart of *Edwards*. The *Edwards* prohibition on the police initiating more interrogation after an arrestee requested counsel "was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *see also Smith v. Illinois*, 469 U.S. 91, 99, n. 8 (1984). However, the chances that an accused will be questioned so repeatedly and in such quick succession that it will "undermine the will" of the person questioned, or will constitute "badger[ing]", are so minute as not to warrant consideration, if the officers are truly pursuing separate investigations. Indeed, permitting the police to inquire of an arrestee about investigations which are truly separate from the one on which he invoked his right to counsel should reassure him that his "right to choose between silence and speech remains unfettered through the interrogation process". (*Miranda v. Arizona*, 384 U.S. at 469.) The restraint of the officers in not questioning about the offense which the person's invocation of counsel has placed off-limits "will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." (*Id.* at 468.) In the meantime, however, as demonstrated by cases like *Routhier* and *Roberson*, the unwarranted extension of the *Edwards per se* rule of exclusion generates none of the benefits which can be "thought to outweigh the burdens . . . impose[d] on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).



In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries. . . ." *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the *Routhier/Roberson* approach does—expand the *Edwards* exclusionary rule into an area not clearly contemplated by that decision. Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann v. Securities and Exchange Commission*, 87 F.2d 377, 378 (2d Cir. 1937), *cert. denied*, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation seems impossible to demonstrate. The actions of the Arizona courts in *Routhier* and *Roberson* bring to mind the warning of Justice Jackson in *Douglas v. Jeannette*, 319 U.S. 157, 181 (1943) (separate opinion) about a court that "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Routhier* and *Roberson* are already two stories too many, and this Court should remove the excrescences before they do damage to the "temple". The *Routhier/Roberson* approach misapplies *Edwards*, and this Court should plainly say so.[6]

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[6]While this Court's "interpretative duties go well beyond deferring to the numerical preponderance of lower court decisions", *Moran v. Burbine*, 475 U.S. 412, 427 (1986), the Court nonetheless has occasionally found such a preponderance of

(Continued on following page)

## II.

## THIS COURT'S CASES CONSISTENTLY RECOGNIZE SEPARATE INVESTIGATIONS AS DISTINCT ENTITIES FOR PURPOSES OF DETERMINING THE ADMISSIBILITY OF CONFESSIONS, SO THE ROUTHIER-ROBERSON APPROACH DEVIATES FROM THIS COURT'S DOCTRINE.

The foregoing argument shows that the *Routhier/Roberson* approach misperceives the facts and reasoning essential to *Miranda* and *Edwards* when it extends *Edwards* to prohibit police initiation of communications about crimes distinct from the one in view when the accused invoked his right to counsel. However, it must also be recognized that many other of the Court's confession decisions show, either directly or by implication, that a distinction must be drawn between situations involving only one investigation and situations involving multiple investigations, and that the *Edwards* ban on police initia-

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lower court understanding to be a factor worthy of note in arriving at its own conclusions. *See, e.g., North Carolina v. Butler,* 441 U.S 369 (1979). It therefore may be of interest that the appellate courts in a number of jurisdictions have concluded (many of them post-*Routhier*) that *Edwards* does *not* bar questioning about unrelated offenses. *See Lofton v. State,* 471 So.2d 665 (Fl.App. 1985), *rev. denied,* 480 So.2d 1294; *State v. Harriman,* 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), *cert. denied,* 106 S.Ct. 1958 (1986); *State v. Dampier,* 333 S.E.2d 230 (N.C. 1985) (notes but declines to follow *Routhier*); *State v. Newton,* 682 P.2d 295 (Utah 1984); *McFadden v. Commonwealth,* 300 S.E.2d 924 (Va. 1983); *State v. Cornethan,* 684 P.2d 1355 (Wash.App. 1984); *cf. State v. Taylor,* 643 P.2d 379, 382 (Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked).



tion of additional interrogation should not be applied to the latter class.

*A. Implications of Westover v. U.S. and Michigan v. Mosley.* Although the Court has had few occasions on which the difference between single investigation and multiple investigation situations has been directly presented to it, the Court has clearly recognized at least twice that this is a highly significant distinction. That such a distinction should be drawn was first indicated by the Court's discussion of *Westover v. United States,* one of the companion cases to *Miranda v. Arizona.* Westover was arrested by Kansas City police on local robbery charges, but was also wanted by the FBI because of some California bank robberies. He was held and interrogated by the Kansas City police for about 14 hours, who gave him no rights warnings, and who eventually turned him over to the FBI when he admitted nothing. Without removing him from the Kansas City police building, the FBI agents gave Westover their standard pre-*Miranda* rights warning, questioned him about the California robberies, and after about 2 hours obtained confessions to the California crimes. In reversing the convictions which occurred in the trials where those confessions were admitted, this Court stated:

> We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. *A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to ex-*

> *ercise them.* But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

(384 U.S. at 496-97; footnote omitted; emphasis added.)

The facts of the present case are almost identical to the situation hypothecated in *Westover* in which the Court said that the confessions would be admissible. Roberson was questioned on April 19 about a burglary which was wholly separate from the one about which he was being interrogated when he invoked his rights to Officer Perez on April 16. Although Detective Cota-Robles, who approached Roberson on April 19, was a member of the same department as Officer Perez, he was a detective (not a uniformed officer) and belonged to a unit different from the one whose detectives had questioned Roberson on April 16. Cota-Robles questioned Roberson at the Pima County Jail; the previous questioning had been conducted at the scene of the arrest and at the Eastside police substation. Cota-Robles' questioning of Roberson was separated by at least 2 days from any other interrogation. Roberson was fully "advised of his rights and given an opportunity to exercise them", not once but several times before he gave his statement to Cota-Robles. Although this Court found that the FBI agents in *Westover* were "the beneficiaries of the pressure applied by the local in-custody interrogation" (384 U.S. at 497), the trial court in this case specifically found that no nexus



existed between Roberson's confession to Cota-Robles on April 19 and the preceding events. Thus, *Miranda* itself, as explained in *Westover*, requires the admission of Roberson's statement.

This Court was directly confronted with a multiple-investigation situation in *Michigan v. Mosley, supra.* Richard Mosley was arrested as a result of a tip, questioned by a member of the Detroit Police Department's Armed Robbery Section about two robberies, and placed in a holding cell after he said he did not want to answer questions about the robberies. (423 U.S. at 97.) Several hours later he was brought to a different office, advised of his *Miranda* rights by a detective of the Homicide Bureau, waived his rights, was questioned about a separate offense (a homicide perpetrated in the course of an attempted robbery), and within 15 minutes gave an inculpatory statement. (*Id.* at 97-98.) This Court held that Mosley's statement was correctly admitted into evidence, despite the seemingly unequivocal language of *Miranda* that, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" (436 U.S. at 473-74), because, properly understood, this passage required only that the accused's exercise of his right to cut off questioning be "scrupulously honored". *Michigan v. Mosley,* 423 U.S. at 100-04. The Detroit police *had* "scrupulously honored" Mosley's invocation of the right to silence:

> [T]he police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, *and restricted the second in-*

*terrogation to a crime that had not been a subject of the earlier interrogation.*

(423 U.S. at 106; emphasis added.)

Thus, the fact that the police renewed interrogation after an invocation of rights by means of questioning that was "restricted . . . to a crime that had not been a subject of the earlier interrogation" was crucial to the majority's resolution of the case. Moreover, Justice White concurred in the result. He was unwilling to join in the majority opinion, because he felt that it implied that statements resulting from interrogations renewed sooner than had been the case with Mosley might still be held to be automatically inadmissible, even though the statements were made as the result of an informed and voluntary decision. (423 U.S. at 107-11). He concluded:

> Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the factfinding process of highly probative information for no reason at all. The "repeated rounds" of questioning following an assertion of the privilege, which the majority is worried about, would, of course, count heavily against the State in any determination of voluntariness—particularly if no reason (such as new facts communicated to the accused *or a new incident being inquired about*) appeared for repeated questioning. There is no reason, however, to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previously contrary decision. The Court should now so state.

(*Id.* at 111; emphasis added.)

In short, in *Mosley* seven members of the Court considered the fact that renewed questioning was about a



separate offense to be highly significant in determining whether statements were admissible. If anything, the facts show that Roberson's right to cut off questioning was more "scrupulously honored" than was Mosley's. That Roberson was questioned about a truly separate offense is certain, while the degree of separateness in *Mosley* has been questioned. (*See* Justice Brennan's dissent, 423 U.S. at 118-19.) Unlike Mosley, Roberson was subjected to no police trickery of any kind. (*See* 423 U.S. at 98 and n. 3.) The 3-day lapse of time between Roberson's invocation of his rights and the questioning by Detective Cota-Robles was far greater than the 2 hours in *Mosley*. Therefore, almost every element which made the statement admissible in *Mosley* is present with even greater force in this case, so *Mosley* strongly supports the proposition that *Edwards* and its *per se* rule (which are based on *Miranda*) should not apply to a multiple investigation situation such as this one.

*B. Edwards v. Arizona.* This conclusion is not directly contradicted by anything in *Edwards v. Arizona* which, as we have already seen, did not involve or address a multiple investigation situation. *Edwards* does run counter to the position taken by Arizona in the present case only to the extent that *Edwards* relies on language from *Miranda* and *Mosley* which suggests that the right to counsel should be more carefully protected than the right to silence. (*See Edwards v. Arizona*, 451 U.S. at 484-85.) However, even accepting that suggestion, it is far from evident that providing a greater *intensity* of safeguards also requires a greater *extension* of safeguards. Thus, that *Edwards* opted for a rule rigidly excluding police-initiated interrogation in a particular case

if counsel is requested, rather than taking a more flexible voluntariness approach, does not logically require a reading of *Edwards* that also bans further questioning on *other* cases, rather than just the one about which the arrestee was being interrogated when he invoked the right to counsel. It is entirely reasonable and consistent to apply strengthened protections in one plane without necessarily adding protections on the other plane. *Cf. Connecticut v. Barrett*, — U.S. —, 107 S.Ct. 828 (1987) (giving a broad interpretation to an ambiguous request for counsel does not require disregarding the sense of a clear but limited request).

The continued development of this Court's jurisprudence of confessions indicates, repeatedly and in a variety of ways, that the *Edwards* rule has not been and should not be applied to bar police-initiated questioning on an investigation separate from the one where the right was invoked. Indeed, in the Powell-Rehnquist concurrance to *Edwards* itself it was hinted that even the right to silence/right to counsel dichotomy discussed in *Mosley* (where, after all, it was dictum, because not necessary to the outcome of the case) was not particularly meaningful or necessary:

> The facts of *Mosley* differ somewhat from the present case because here petitioner had *requested counsel*. It is nevertheless true in both cases that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.*, at 102 (opinion of STEWART, J.)



(451 U.S. at 491, n. 1; emphasis in original.)

*C. The impact of Oregon v. Elstad.* Perhaps the strongest single indication that this Court is unwilling to expand *Edwards* to multiple investigation cases can be found in *Oregon v. Elstad*, 470 U.S. 298 (1985). Michael Elstad took part in the burglary of a neighbor's house. When police detectives first questioned Elstad in his home they gave him no *Miranda* warnings, and he made a statement incriminating himself. (*Id.* at 300-01.) He then was transported to the police station, properly advised of his rights, and he provided a detailed confession. (*Id.* at 301-02.) The trial court excluded the first statement but admitted the full confession, finding that it was not tainted by the first statement, and had been made "freely, voluntarily, and knowingly". (*Id.* at 302.) The Oregon appellate courts disagreed, holding that even the full confession should have been suppressed, so review in this Court was sought and granted. (*Id.* at 302-03).

Elstad first argued that the confession should be suppressed because it supposedly was "tainted fruit of the poisonous tree" of the *Miranda* violation. (*Id.* at 303.) This Court rejected that argument because *Miranda* sweeps more widely than does the Fifth Amendment, and the implementation of such a prophylactic rule need not mimic the enforcement of an actual constitutional provision. (*Id.* at 303-08.)

> In deciding "how sweeping the judicially imposed consequences" of a failure to administer *Miranda* warnings should be, 417 U.S., at 445, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be

served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

*We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive Miranda violation is neither a witness nor an article of evidence but the accused's own voluntary testimony.* As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities.

* * *

"[P]olicemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." *Michigan v. Tucker, supra*, at 446. If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warning, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. *Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.*

(*Id.* at 308-09, emphasis added.)

The implications for the present case are inescapable. Roberson actually was given his *Miranda* warnings in the



field, but a noncoercive violation occurred when he was questioned on April 16 after he had invoked his right to counsel. Therefore, the April 16 statements, the direct results of that violation, were suppressed. If anything, Michael Elstad was in a worse position, because he was not given any warnings at all before being questioned in the field; this noncoercive *Miranda* violation resulted in the suppression of his initial statement. However, such suppression satisfied *Miranda*, so his subsequent station-house confession was to be evaluated solely in terms of "whether it is knowingly and voluntarily made." (470 U.S. at 309.) Such an evaluation of Roberson's April 19 confession has, in effect, already been done by the trial court, which found it to be voluntary and trustworthy in the sense of *Harris v. New York*. There being no meaningful way to distinguish *Elstad* from the present case, it leaves no doubt that the April 19 confession should have been admissible against Roberson in the prosecution case in chief.

This conclusion is bolstered by *Elstad's* discussion of the "cat out of the bag" metaphor. Where the initial admission, though obtained in violation of *Miranda*, is "clearly voluntary" then "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." (470 U.S. at 310-11.) On the other hand, "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether the coercion has carried over into the second confession." (*Id.* at 310.) "Even in such extreme cases

as *Lyons v. Oklahoma*, 322 U.S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated." (*Id.* at 311-12.)

The circumstances here (passage of time, change of place, change of interrogators), include all the factors which would serve to dissipate the coercive effect of even an *involuntary* initial statement, as well as the proper administration of *Miranda* warnings by Detective Cota-Robles, which would by itself "cure" an uncoerced and voluntary initial statement. Such a factual pattern will necessarily recur in virtually every case where an *Edwards* "violation" results from the police good-faithedly pursuing an investigation separate from the one where the counsel right was invoked. *Elstad* would seem to leave no choice but to hold statements given in such separate investigations completely admissible.

*D. Limited invocation of the right to counsel—Connecticut v. Barrett.* Yet another important indicator of this Court's understanding of how far *Edwards* can properly be applied is the very recent decision in *Connecticut v. Barretts*, — U.S. —, 107 S.Ct. 828 (1987). Barrett attacked the admissibility of an otherwise knowing and voluntary oral confession he had made to the police, after telling them he was willing to talk about the charges "verbally but he did not want to put anything in writing until his attorney came". (*Id.* at 830-31.)

> The trial court found that this decision was a voluntary waiver of his rights, and there is no evidence that Barrett was "threatened, tricked, or cajoled" into this waiver. *Miranda*, 384 U.S., at 476, 86 S.Ct., at 1628. The Connecticut Supreme Court nevertheless held as a matter of law that respondent's limited invocation of his right to counsel prohibited all interrogation absent initiation of further discussion by Barrett. *Nothing in our decisions, however, or in the rationale of Miranda, requires authorities to ignore the tenor or sense of a defendant's response to these warnings.*

(107 S.Ct. at 831; emphasis added.)

> The Connecticut Supreme Court's decision . . . rested on the view that requests for counsel are not to be narrowly construed. . . . We do not denigrate the "settled approach to questions of waiver [that] requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel," *Michigan v. Jackson*, 475 U.S. —, —, 106 S.Ct. 1404, —, 89 L.Ed.2d 631 (1936), when we observe that this approach does little to aid respondent's cause. *Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. Here, however, Barrett made clear his intentions, and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.*

(*Id.* at 832; footnotes omitted; emphasis added.)

This holding recognized the validity of limited invocations of the right to counsel. The "ordinary meaning" of Roberson's request for counsel to Officer Perez necessarily was an invocation limited to the incident on which he had just been arrested, because Roberson had no way of knowing that 3 days later different police following separate leads would want to talk to him about a wholly distinct crime. These subsequent events cannot render

ambiguous what was unambiguous at the time Roberson's words were spoken. *Cf. Smith v. Illinois*, 469 U.S. 91 (1984) (accused's request for counsel cannot be rendered ambiguous by his subsequent remarks). Since the invocation was thus limited, the effects of any violation necessarily must be similarly limited, and could not invalidate the statement given to Cota-Robles on an offense as to which counsel had not been invoked.

*E. Michigan v. Jackson, Maine v. Moulton, and Moran v. Burbine.* Some notice must be taken of *Michigan v. Jackson*, 475 U.S. 625 (1986). There this Court held that *Edwards*, which is itself grounded in the Fifth Amendment, should be applied by analogy in a Sixth Amendment context, so that if an accused requests counsel during an arraignment or similar proceeding, subsequent initiation of interrogation by the police is barred by *Edwards*, and any waiver of the right to counsel is invalid. It is not clear from the record before this Court whether Roberson had been formally arraigned on the April 16 burglary (CR-15268) at the time he was interviewed by Detective Cota-Robles on April 19, though it is virtually certain that he had requested assignment of counsel before that interview.[7]

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[7]Under Arizona law, the "arraignment" (i.e., entrance of a plea) may or may not take place at the time of the defendant's initial appearance. Arizona Rule of Criminal Procedure 14.3. The initial appearance occurs within 24 hours of the arrest or the person must be released, and at the initial appearance counsel is assigned for indigent persons who request counsel. (Arizona Rules of Criminal Procedure 4.1 and 4.2) Roberson was still in jail 3 days after the April 16 arrest, and he was later found indigent and assigned the Public Defender as counsel in CR-16041 (the full record of which is before this Court). (R. at 16.) We may therefore safely assume that he likewise was indigent, and requested and was assigned counsel during the initial appearance on CR-15268, which must have occurred before the April 19 interview.



Assuming arguendo that *Michigan v. Jackson* activated *Edwards*, so as to shield Roberson from police-initiated interrogation in CR-15268, the very Sixth Amendment jurisprudence on which *Jackson* relies leaves no doubt that no such protection was triggered in the wholly separate case now before this Court. *Michigan v. Jackson* does not alter the settled rule that Sixth Amendment protections arise only after formal initiation of proceedings, so that "a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment." (475 U.S. at 632.) No charges had been formally commenced against Roberson in CR-16041 when he was interviewed on April 19, and the presumed request for counsel in CR-15268 could not serve to trigger *Jackson/Edwards* protections in the separate case. In *Maine v. Moulton*, 474 U.S. 159 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [*To*] *exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.* Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of *those* charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment

by *knowingly circumventing* the accused's right to the assistance of counsel.[16]

[16] *Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.*

(474 U.S. at 180; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori, statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with *Miranda* and *Edwards* in *this* investigation, the statements given should be entirely admissible. This is especially true because there was no *knowing* circumvention of Roberson's right to counsel; on the contrary the police followed *Miranda* to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by *Moran v. Burbine*, 475 U.S. 412 (1986), which held that a confession is admissible, even if the defendant's lawyer is not permitted to contact the defendant, when the defendant makes an otherwise voluntary and intelligent rights waiver. *Moran* points out that society has a "compelling interest" in



obtaining confessions from lawbreakers; that the existence of a lawyer-client relationship on one charge does not create a Sixth Amendment right to the presence of counsel during interrogation on a different charge; and that the *Miranda* guarantee of the presence of counsel is triggered *only* by a request. (475 U.S. at 426, 430-31, and 433, n.4.) Roberson thus had no right to counsel already operative when the detectives approached him about the present case. To be protected he had to invoke the right, which he failed to do, so his statements are completely admissible.

*F. Conclusion from the case law survey.* This Court's post-*Miranda* cases on confessions constitute a substantial corpus. However, no part of that extensive body of decisions warrants precluding a voluntary statement, given after proper *Miranda* warnings, merely because the right to counsel has previously been invoked in a wholly separate investigation. Moreover, this Court's "independent source" case law, which has been applied to both Fifth and Sixth Amendment situations, militates strongly against exclusion in a multiple investigation case such as the present one.

> [T]he derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. The independent source doctrine teaches us that the interest of so-

> ciety in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. See *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459, 92 S.Ct. 1653, 1663-1664, 32 L.Ed.2d 212 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

*Nix v. Williams*, 467 U.S. 431, 443-44 (1984) (emphasis in original).

To suppress evidence which has no relation whatever to a prior police illegality is to effectively put the police in a worse situation than if there had been no error, and that, according to *Nix v. Williams*, is unacceptable. *Routhier/Roberson* plainly violates this altogether logical rule. The "independent source" doctrine applies to statements (whether of witnesses or suspects), not just tangible evidence. *United States v. Ceccolini*, 435 U.S. 268 (1977), and cases discussed therein. The questioning done by Detective Cota-Robles on April 19 concerning the April 15 burglary is obviously something that happened altogether independently of the improper resumption of questioning which occurred after the invocation of rights on April 16. No logic can justify suppression of the voluntary statements elicited at that time, so the exclusion of evidence ordered in this case must be reversed.



## III.

## THIS COURT SHOULD RECONSIDER EDWARDS, ABROGATE ITS PER SE RULE AGAINST POLICE INITIATION OF CONVERSATION AFTER A RIGHTS INVOCATION, AND APPLY INSTEAD THE TRADITIONAL WAIVER TEST OF JOHNSON v. ZERBST, 304 U.S. 458 (1938).

The two previous arguments have shown the Court that nothing in *Edwards v. Arizona* or its other decisions provides warrant for the exclusion of voluntary, properly "*Mirandized*" statements simply because the right to counsel had been invoked during a wholly separate investigation. Those arguments thereby provide an acceptable basis for overturning the particular order excluding evidence in this case, and for rejecting the erroneous interpretation of *Edwards* applied by the Arizona courts. There is, however, another approach available which would yield the same result for this case and would provide other benefits as well: reconsider and overrule *Edwards* itself, to the extent that it makes police initiation of contact after a rights invocation a *per se* violation rather than simply one datum in assessing the validity of a waiver.[8] Absent the *Edwards per se* rule the statement excluded in this case would, without question, be admissible.

There are a number of persuasive reasons for adopting this seemingly radical remedy. To begin with, it should be recalled that this Court has already acknowledged that "*Edwards* was not a necessary consequence of *Miranda*"

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[8]This suggestion was not presented to the Arizona courts for the obvious reason that they lacked the authority to modify *Edwards*.

(*Solem v. Stumes*, 465 U.S. at 648), let alone mandated by the constitution. In fact, the existence of *Edwards* is not really necessary for either a fair trial or a civilized interrogation process.

> The Edwards rule has only a tangential relation to truthfinding at trial. . . . The application of the exclusionary rule pursuant to *Edwards* is perhaps not as entirely unrelated to the accuracy of the final result as it is in the Fourth Amendment context. Yet *the Edwards rule cannot be said to be a sine qua non of fair and accurate interrogation*. . . . The fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate. Most important, in those situations where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statement and, therefore, the accuracy of the outcome at trial, it is likely that suppression could be achieved without reliance on the prophylactic rule adopted in Edwards.

(*Solem v. Stumes*, 465 U.S. at 643-44; emphasis added.) Substantial questions have been raised about this Court's authority to propound "prophylactic rules" which invalidate official conduct without an actual constitutional violation ever having been demonstrated. *See, e.g.*, Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III* Legitimacy, 80 Nw. U.L. Rev. 100 (1985). Even if the Court possesses the authority to promulgate rules like that in *Edwards*, it would seem that a necessary prerequisite to such rule-making would be a "powerful showing" that the "rules are plainly desirable in the context of our society . . . before those rules are engrafted onto the Constitution and imposed on every State and county in the land," *Miranda v. Arizona*, 385 U.S. at 515 (Harlan,



J., dissenting.) The luke-warm support for *Edwards* enunciated in *Solem v. Stumes, supra*, suggests that, however beneficial the *Edwards per se rule* may have looked prospectively, experience has shown it to be of minimal value. It should therefore be rescinded.

The case for modifying *Edwards* is now particularly strong because the Court seems to have had second thoughts about the importance of the critical fact in that case—Edwards' invocation of counsel. He did not request counsel for all purposes, or even to consult with before interrogation; he said, "I want an attorney before making a deal." (451 U.S. at 479.) If we accept those words in their ordinary sense, they appear legally indistinguishable from the limited invocation of counsel discussed by this Court in *Connecticut v. Barrett, supra*. But if Robert Edwards' invocation was *limited* (as it apparently was), and the police complied with it (as they did—no deal was discussed so 't was never necessary to provide a lawyer), there simply were no grounds for setting up what we now know as the "*Edwards* rule". The result might well have been the same in the absence of the *per se* rule, because of the potential for coercion in the jailer's remark that Edwards "had to" speak to the detectives (*see* Chief Justice Burger's concurrence), but *Barrett* has dissipated any factual basis for the "*Edwards* rule".

*Edwards* also appears ripe for reconsideration because a legal assumption which was fundamental to the decision—that the right to counsel should be more stringently protected than the right to silence—itself appears to be open to question. Whatever differences in historical development and theoretical underpinnings there may be be-

tween the two rights, *in the context of interrogation* they become essentially equivalent—the warning of the right to silence tells the arrestee that he need not speak, while the warning of the right to counsel tells the arrestee that he can consult with another man who will tell him not to speak.

> The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante*, p. 470) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts v. Indiana*, 338 U.S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

*Miranda v. Arizona*, 384 U.S. at 516 (Harlan, J., dissenting.) It makes no more sense to impose a differentiated system of protections for effectively equivalent rights than it would to establish graduated burdens of proof which distinquish between due process voluntariness and waivers of *Miranda's* "auxiliary protections". The latter theory was recently rejected by this Court in *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1986). That the factual distinction between invoking the right to silence and invoking the right to counsel might be one that made no legal difference was suggested in the Powell-Rehnquist concurrence to *Edwards*. (451 U.S. at 491, n. 1.) It now is wholly reasonable for the entire Court to flatly say so.

Another reason for dispensing with the *Edwards per se* rule is that it simply has not proved to be the easily applied "bright-line rule" it was intended to be. The various opinions in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), show that this Court has not agreed even within itself



about the meaning of *Edwards'* critical concept, "initiation." Such internal division provides little guidance for the police and lower courts. *See* Note, *It's Better the Second Time Around—Reinterrogation of Custodial Suspects Under Oregon v. Bradshaw*, 45 U. PITT.L.REV. 899 (1984). The purpose for *Miranda* was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." (384 U.S. at 441-42.) This Court has declined to adopt a rule which would contribute only marginally to fulfilling *Miranda's* goals if the proposed rule would result in "muddying *Miranda's* otherwise relatively clear waters". *Moran v. Burbine*, *supra*, 475 U.S. at 425. The *Edwards per se* rule has shown itself to be more trouble than it's worth, so it should be dropped.

Elimination of the *Edwards per se* rule was described at the beginning of this argument as being only a "seemingly" radical remedy. That characterization is appropriate because the history of this Court's post-*Miranda* decisions has been a history of refining a substantial number of statements therein which subsequent experience and reflection showed to be in need of modification. *Miranda* repeatedly described itself in *constitutional* terms. For example, the majority opinion states that one reason for granting certiorari was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." (384 U.S. at 441-42.) However, the Court made clear in *Michigan v. Tucker*, 417 U.S. 433 (1974), that *Miranda's* procedures are *not* constitutionally required. As we have already seen, *Miranda* says quite flatly that if the right to silence is invoked, "the interrogation must cease" (384 U.S. at 474), but the Court in *Michigan v. Mosley* held that such cessation was not absolute or per-

manent, and that the police could renew questioning if the arrestee's right to silence was "scrupulously observed". *Miranda* said that, "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." (384 U.S. at 475.) It also said that, "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." (*Id.* at 470.) Nonetheless, *North Carolina v. Butler*, 441 U.S. 369 (1979), held that a waiver of the right to counsel does *not* have to be explicit. *Miranda* had said that, "By custodial interrogation, we mean questioning initiated by law enforcement officers . . . ", but *Rhode Island v. Innis*, 446 U.S. 291 (1980), concluded that "interrogation" actually encompasses more than just "questions".

This chronicle of adjustments shows that *Miranda* itself has not been classed with "the law of the Medes and the Persians, which may not be revoked" (Daniel 6:12); a fortiori, *Edwards*, which "was not a necessary consequence of *Miranda*" (*Solem v. Stumes*, 465 U.S. at 648), is plainly subject to appropriate changes. Such amendment is not precluded by the doctrine of stare decisis, for this Court has said:

> [W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.



*Smith v. Allwright*, 321 U.S. 649, 665-66 (1944) (footnotes omitted). The *Edwards per se* rule is an extension of a "prophylactic" procedural rule formulated to safeguard the exercise of a constitutional privilege. Correction of something at so many removes from the Constitution itself should give this Court no qualms.

The effect of the *Edwards per se* rule is to equate police initiation of conversation after a rights invocation with coercion and overreaching. Were the *Edwards* rule an inference utilized in some criminal statute this Court would strike it down immediately, for lack of connection with reality. An inference is " 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," *Leary v. United States*, 395 U.S. 6, 36 (1969). While the facts concerning "initiation" certainly are relevant, application of the traditional *Johnson v. Zerbst* totality of the circumstances approach would completely fulfill this Court's intent in protecting against the government coercion which is the basis for *Miranda* while avoiding the perpetuation of an irrational and unnecessary exclusionary rule. *Cf. Colorado v. Connelly, supra.* Therefore, this Court should so modify *Edwards*, and overrule the suppression order in this case.

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## CONCLUSION

It is abundantly clear that nothing in *Miranda*, *Edwards*, or the rest of this Court's jurisprudence of confessions warrants excluding from evidence the completely voluntary and properly warned admissions of a defendant merely because he previously had invoked his right to counsel in a wholly separate investigation. However, it also is plain that the very *per se* rule of *Edwards* which has been alleged to require such exclusion is itself undesirable and unsupportable. The best course would be for this Court to revisit *Edwards* and replace its *per se* rule with the traditional waiver rule of *Johnson v. Zerbst*, which would allow for consideration of police "initiation" in evaluating a waiver of the previously invoked right to counsel, but would not make "initiation", in Justice Powell's words, "the *sine qua non* to the inquiry". *Edwards v. Arizona*, 451 U.S. at 491 (Powell, J., concurring).

Such an approach would be consistent with this Court's recent admonition to itself to decide a case involving alleged police interrogation after invocation of the right to counsel "remember[ing] the purpose behind our decisions in *Miranda* and *Edwards:* preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, — U.S. —, 107 S.Ct. 1931, 1936-37 (1987). At the very least the Court should declare, even if the *Edwards per se* rule is to be maintained, that it does not apply to police initiation of questioning in an investigation that is wholly separate from the one in which the defendant invoked his



right to counsel. Under either approach the exclusionary order issued in this case must be reversed.

Respectfully submitted,

ROBERT K. CORBIN
The Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

BRUCE M. FERG
Asst. Attorney General
315 State Government Bldg.
402 West Congress
Tucson, Arizona 85701-1367
Telephone: (602) 628-5501

Counsel of Record